Supreme Court, U.S.
FILED

No. 061123

FEB 1 2007
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

ANIMAS VALLEY SAND AND GRAVEL, INC, PETITIONER

v.

THE BOARD OF COUNTY COMMISSIONERS FOR THE COUNTY OF LA PLATA, COLORADO

PETITION FOR A WRIT OF CERTIORARI TO THE STATE OF COLORADO COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

WILLIAM E. ZIMSKY
Counsel of Record
900 Main Avenue
Suite E
Durango, CO 81301
970.259.7222

CURRY & TAYLOR ♦ WASH D.C. ♦ (202) 223-3160 ♦ USSCINFO.COM

QUESTION PRESENTED

Does a zoning regulation, enacted primarily for aesthetic purposes and not to prevent some important public harm or injury, that frustrates a landowner's reasonable investment-backed expectations and diminishes the value of his property by 70.6%, effect a compensable regulatory takings?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 1

RELEVANT PROVISIONS INVOLVED 1

STATEMENT 2

REASONS FOR GRANTING THE PETITION 7

A. The Colorado court of appeals has decided an important federal takings question that has not been, but should be, settled by this Court 7

B. The Colorado court of appeals decided an important federal takings question in a way that conflicts with relevant decisions of this Court 11

CONCLUSION 13

APPENDIX

Colorado Supreme Court En Banc Order (11/13/2006) 1a

Colorado Court of Appeals Decision(II) 3a

District Court, La Plata County, Colorado Order (Filed 9/2/2004) 14a

Excerpted Plaintiff's Proposed Findings of Fact and Conclusions of Law 47a

TABLE OF AUTHORITIES

Page

CASES

AGINS V. TIBURON, 447 U.S. 255 (1980) 10

ANIMAS VALLEY SAND & GRAVEL, INC. V. BD OF COUNTY COMM'RS OF THE COUNTY OF LA PLATA, COLORADO, 38 P.3D 59, 65 (COLO. 2001) 4, 6, 12

ANIMAS VALLEY SAND & GRAVEL, INC. V. BD. OF COUNTY COMM'RS OF THE COUNTY OF LA PLATA, COLORADO, 8 P.3D 522, 525-27 (COLO. APP. 2000) 3

CREPPEL V. U.S., 41 F.3D 627, 631 (FED. CIR. 1994) 9

FLORIDA ROCK INDUSTRIES, INC. V. U.S., 45 FED. CL. 21, 36 (1999) 10

HADACHECK V. SEBASTIAN, 239 U.S. 394 (1915) 11

LINGLE V. CHEVRON U.S.A., 544 U.S. 528, 125 S.CT. 2074, 161 L.ED.2D 876 (2005) 6, 10, 12

LUCAS V. SOUTH CAROLINA COASTAL COUNCIL, 505 U.S. 1003, 1029 (1992) 9

PENN CENT. TRANSP. CO. V. NEW YORK CITY, 438 U.S. 104 (1978) 4

PENNSYLVANIA COAL CO. V. MAHON, 260 U.S. 393, 415 (1922) 7

SAN REMO HOTEL, L.P. V. SAN FRANCISCO CITY AND COUNTY, 545 U.S. 323, 125 S.CT. 2491 (2005) 3

VILLAGE OF EUCLID V. AMBLER REALTY CO., 272 U.S. 365 (1926) 10

WALCEK V. U.S., 49 FED.CL. 248, 270 (2001) AFF'D, 303 F.3D 1349 (FED.CIR.2002) 8

WILLIAMSON COUNTY REGIONAL PLANNING COMMISSION V HAMILTON BANK, 473 U.S. 172, 194-95 (1985) 2

YANCEY V. UNITED STATES, 915 F.2D 1534, 1541 (FED.CIR.1990) 10

STATUTES

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1738 3

CONSTITUTIONAL PROVISIONS

UNITED STATES CONSTITUTION, AMEND. V ..... *passim*

OTHER AUTHORITIES

BREEMER, J. DAVID, OVERCOMING WILLIAMSON COUNTY'S TROUBLING STATE PROCEDURES RULE, 18 J. LAND USE & ENVTL. L. 209, 240, 242 (2003) 2

MEACHAM, MADELINE J., THE WILLIAMSON TRAP, 32 URB. LAW. 239 (2000) 2

OPINIONS BELOW

The opinion of the Colorado court of appeals (App. 3a-13a) is unreported. The opinion of the district court (App. 14a-46a) is unreported.

JURISDICTION

The Colorado Supreme Court denied AVSG's Petition for Writ of Certiorari on October 12, 2006. App. 1a-2a. AVSG invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT

This is an inverse condemnation case alleging a regulatory taking under the takings clause of the Fifth Amendment. The complained of regulation is the Animas Valley Land Use Plan ("the Plan") adopted by Respondent The Board of County Commissioners for the County of La Plata, Colorado ("the County") in 1994. The Plan designated 33.9 acres of AVSG's 41.9-acre parcel as part of the Plan's River Corridor District barring commercial mining, including sand and gravel operations. AVSG argues that the Plan effected a compensable taking under the Fifth Amendment of AVSG's property, which it had purchased in 1961 with the intent of developing the property as a sand and gravel pit.

The Plan allows sand and gravel operations to occur at 21 other locations within the Plan's area, consisting of 265 acres, including on approximately 8 acres of AVSG's property.

In February 1996, AVSG filed an inverse condemnation petition in state court alleging a taking under COLO. CONST. art. II, §15.[1] The trial court held that

---

[1] AVSG originally filed its suit against the County only under the takings clause of the Colorado Constitution based on the interpretation of this Court's holding in *Williamson County Regional Planning Commission v Hamilton Bank*, 473 U.S. 172, 194-95 (1985) that a federal takings claim was not ripe until a landowner had exhausted any available state inverse condemnation remedies. However, that interpretation had been question by several commentators. See, e.g., Meacham, Madeline J., THE WILLIAMSON TRAP, 32 Urb. Law. 239 (2000); Breemer, J. David, OVERCOMING WILLIAMSON COUNTY'S TROUBLING STATE PROCEDURES RULE, 18 J. Land Use & Envtl. L. 209, 240, 242 (2003) (noting that that this was

in order for a regulation to effect a compensable takings under the Colorado Constitution, the complained of regulation "must foreclose all reasonable uses of that property." The trial court stated that AVSG "failed to carry its burden of establishing that it could not put its property to reasonable use" and, therefore, found that no takings had occurred.

AVSG appealed that decision to the Colorado court of appeals. The court of appeals affirmed, holding that a regulation that substantially diminishes the value of a landowner's property, but stops short of denying the landowner any reasonable use of the property, does not effect a compensable takings under the Colorado Constitution. *Animas Valley Sand & Gravel, Inc. v. Bd. of County Comm'rs of the County of La Plata, Colorado*, 8 P.3d 522, 525-27 (Colo. App. 2000) ("*Animas I*").

The Colorado Supreme Court reversed the court of appeals, holding that a landowner could be entitled to compensation under the Colorado Constitution even if his property retained some economic use and value after the

---

not just a trap for the unwary, it is a "procedural snare that swallows the careful takings claimant as well as the unwary"). In *San Remo Hotel, L.P. v. San Francisco City and County*, 545 U.S. 323, 125 S.Ct. 2491 (2005), this Court ended the debate, holding that the relationship between *Williamson*'s ripeness requirement, the doctrine of claim preclusion and the full faith and credit statute, 28 U.S.C. § 1738, mandates that a plaintiff alleging a federal takings claim through inverse condemnation by a non-federal actor, must bring that claim as part of his state suit if the state provides for a procedures for obtaining compensation for the condemnation. Before that decision, however, as set forth below, the district court granted AVSG's motion to amend its complaint to add a federal takings claim. This petition contests the state court's decision on AVSG's federal takings claim.

implementation of the complained of regulation. *Animas Valley Sand & Gravel, Inc. v. Bd. of County Comm'rs of the County of La Plata, Colorado*, 38 P.3d 59, 65 (Colo. 2001) ("*Animas II*"). In *Animas II*, the Colorado Supreme Court directed the trial court on remand to utilize the various factors discussed in *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978), as a touchstone to determine whether the Plan constituted a taking of AVSG's property. 38 P.3d at 64; 65. In its decision, the Colorado Supreme Court noted that the *Penn Central* character of the governmental action factor weighed in favor of the County because the Plan "serves a legitimate governmental purpose." *Id.* at 66, n. 5.

The Colorado Supreme Court directed the trial court on remand to: (1) determine whether AVSG could have obtained the necessary permits to operate a sand and gravel pit, notwithstanding the Plan; (2) determine whether the Plan adversely interfered with AVSG's reasonable investment-backed expectations regarding the long-term development of its property; (3) calculate the pre-regulation and post-regulation value of AVSG's property; and (4) take into consideration other facts that may be relevant. *Id.* at 66-67.

On remand, the trial court granted AVSG's request to add a federal takings claim to its complaint. A five-day trial to the court was held January 27 through January 31, 2003. On September 2, 2004, the trial court issued its "Order – Trial to the Court." (App. 14a-46a). The trial court held that: (1) AVSG could have obtained the necessary permits to operate a sand and gravel pit, notwithstanding the Plan (App. 29a-30a; [Findings at ¶ 46]; App. 43a [Conclusions at ¶ 9]); (2) "AVSG had reasonable, investment-backed expectations that it, in the

absence of the [Plan], could have designed, permitted and operated a profitable sand and gravel mine on [its property];" (App. 45a [Conclusions at ¶ 12]); and (3) the pre-regulation value of the property was $850,000 and the post-regulation value was $250,000. App. 44a (Conclusions at ¶ 11).

The trial court did not address AVSG's argument that it made in its Proposed Findings of Fact and Conclusions of Law with respect to the *Penn Central* "character of the governmental action" factor. AVSG argued that the fact that the County designated its property as part of the River Corridor District due primarily to aesthetical considerations and not to prevent an important public harm or injury, weighed in favor of finding that the Plan constituted a taking of its property.

The trial court held that even though AVSG could have obtained the necessary permits to mine its property notwithstanding the Plan and that the Plan interfered with AVSG's reasonable investment-backed expectations, causing a 70.6% diminution in value of AVSG's property, the Plan did not effect a compensable taking of AVSG's property under either the Colorado or United States constitutions. App. 45a-46a (Conclusions at ¶ 13; and ordering paragraphs 1 (denying AVSG's takings claim brought under Art. II, sec. 15 of the Colorado Constitution) and 2 ("[AVSG's] claim for compensation for a regulatory taking pursuant to the United States Constitution, Amendment V, is denied").

AVSG filed an appeal with the Colorado court of appeals. Part of AVSG's argument to the court of appeals was that the trial court failed to take into consideration other factors, such as the fact that the County adopted

the Plan for aesthetic purposes and not to prevent some important public harm or injury. At oral argument, AVSG's counsel, citing to the United States Supreme Court's recent decision in *Lingle v. Chevron U.S.A.*, 544 U.S. 528, 125 S.Ct. 2074, 161 L.Ed.2d 876 (2005), also contended that whether the Plan "serves a legitimate governmental purpose" has no place in making a takings determination.

On April 6, 2006, the court of appeals affirmed the trial court's decision holding that the Plan did not effect a taking of AVSG's property under the Fifth Amendment of the United States Constitution ("*Animas III*"). App. 3a-13a.

In its decision, the court of appeals rejected AVSG's argument that the fact that the County enacted the plan "for aesthetic purposes and not to prevent some important public harm" should be considered as a factor in determining whether a taking had occurred. App. 8a. The court of appeals reasoned that this fact was not relevant to a takings determination because in *Animas II*, the Colorado Supreme Court held that the Plan "serves a legitimate governmental purpose." 38 P.3d at 66, n. 5, App. 8a, and because the trial court found that the Plan was lawfully enacted. App. 9a. The court of appeals also found that *Lingle* was inapposite. App. 8a.[2]

---

[2] The court of appeals also found that AVSG did not raise this issue before the trial court. App 8a. This contention is demonstrably incorrect. In its "Proposed Findings of Fact and Conclusion of Law (Corrected Copy)," filed with the trial court, AVSG argued:

> The character of the governmental action in adopting the [Plan] was to provide a benefit to the public by making the Subject Property more scenic and attractive . . . However,

On April 19, 2006, AVSG filed a Petition for Rehearing with the Colorado court of appeals within the time allotted under C.A.R. 52(c) for filing such petitions. The court of appeals denied AVSG's Petition for Rehearing on May 25, 2006.

AVSG filed a writ of certiorari with the Colorado Supreme Court on June 27, 2006 within the time allotted under C.A.R. 52(c). The Colorado Supreme Court denied the petition on November 13, 2006. App. 1a-2a.

REASONS FOR GRANTING THE PETITION

A. The Colorado court of appeals has decided an important federal takings question that has not been, but should be, settled by this Court

The Court should grant this Petition because the Colorado court of appeals decided an important federal takings issue that has not been, but should be, settled by this Court.

Specifically, this Court has not addressed the issue of whether a regulation "goes too far"[3] so as to constitute a compensable taking by reducing the value of property by 70% in a situation in which the facts are most favorable for the landowner, *viz.*, the complained of

---

AVSG did not enjoy any reciprocal benefit. *Id.* Under such circumstances, the character of the government action gives rise to a takings claim.

App. 48a.

[3] *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

regulation was not designed to prevent some important public harm or injury while frustrating a landowner's reasonable investment-backed expectations.

There is a vacuum in takings jurisprudence that a decision in this case will help fill, benefiting not only governmental bodies by assisting them in avoiding the enactment of regulations that may constitute takings, but also helping landowners determine whether to undertake the arduous task of seeking compensation based on a regulation that they believe constitutes a taking of their property.

This appeal is an ideal vehicle for filling the vacuum in takings jurisprudence because it presents a "clean" set of facts, *i.e.*, a set of facts in which all three of the main *Penn Central* factors – character of the government action, adverse impact upon landowner's reasonable investment-back expectations and economic impact of regulation, weigh in favor of the landowner. If the Court holds that no takings occurred in this case, then regulators and landowners will know that unless a regulation diminishes property by more than 70%, no takings claim will lie against such a regulation since all of the other factors in this case weigh in favor of a takings finding.

In evaluating the character of the governmental action factor, a court considers "the purpose and importance of the public interest underlying the regulatory imposition, focusing, in particular, on whether the challenged restraint would constitute a nuisance under state law." *Walcek v. U.S.*, 49 Fed.Cl. 248, 270 (2001), *aff'd*, 303 F.3d 1349 (Fed.Cir.2002). A court "must inquire into the degree of harm created by the claimant's

prohibited activity, its social value and location, and the ease with which any harm stemming from it could be prevented." *Creppel v. U.S.*, 41 F.3d 627, 631 (Fed. Cir. 1994).

In this case, "the primary purpose of the regulation was to promote a scenic corridor and not to prevent an important public harm or injury. In addition," sand and gravel production is an economically necessary and socially beneficial activity and one that the Plan actually allows to occur at 21 other locations within the Plan's area, consisting of 265 acres, including on approximately 8 acres of AVSG's property.

A major stumbling block for many takings claims is the landowner's inability to demonstrate that he had a "reasonable investment-back expectation" that he could develop his property absent the complained of regulation. As noted in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1029 (1992), a landowner's takings claim is often defeated because "background principals of state property law and nuisance" already place restrictions on the use of the land even in the absence of the complained of regulation

This case is free from this obstacle because the trial court found that AVSG could have obtained the necessary permits to operate a sand and gravel pit notwithstanding the Plan and also held that the Plan adversely affected AVSG's reasonable, investment-backed expectations that AVSG could have designed, permitted and operated a profitable sand and gravel mine on its property.

The economic impact of the Plan is significant - the loss of 70.3% of the value of its property is substantial and compares favorably to the economic impact in other cases in which takings were found to have occurred. For example, in *Florida Rock Industries, Inc. v. U.S.*, 45 Fed. Cl. 21, 36 (1999), the Court of Federal Claims held that a regulation which prohibited the mining of limestone resulted in a 73.1% diminution in the value of the real property constituted a taking. Similarly, in *Yancy*, the Federal Circuit held that a taking occurred when there was a 77% reduction in value of personal property.

The three cases cited by the trial court (App. 46a), which the court of appeals referred to in *Animas III* (App. 6a), are not applicable. As the Federal Circuit has noted, "we do not read these early precedents [*Village of Euclid*, *infra* and *Hadacheck*, *infra*] as creating an automatic numerical barrier preventing compensation, as a matter of law, in cases involving a smaller percentage diminution in value." *Yancey v. United States*, 915 F.2d 1534, 1541 (Fed.Cir.1990). More importantly, these earlier cases were not regulatory takings cases seeking just compensation, but instead were substantive due process challenges to the regulations themselves.

First, the Court's decision in *Agins v. Tiburon*, 447 U.S. 255 (1980), in which no taking was found despite an 85% loss of value, was based on the finding that the zoning ordinances at issue "substantially advance legitimate governmental goals." 447 U.S. at 261. The Court abrogated the "substantially advances" formula announced in *Agins* as a test for determining regulatory takings cases. *Lingle*, 544 U.S. at 545.

Second, *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), was not a regulatory takings case. Rather, *Village of Euclid* involved a substantive due process challenge where the landowner claimed that a zoning ordinance was void as an unconstitutional imposition on the use of the property. The landowner was not seeking just compensation for loss of value as AVSG is doing in this regulatory takings claim, but was asking instead that the zoning ordinance be declared unconstitutional under the Fourteenth Amendment.

Finally, *Hadacheck v. Sebastian*, 239 U.S. 394 (1915), like *Village of Euclid*, involved a facial challenge to the validity of a zoning ordinance. The landowner in *Hadacheck* alleged both substantive due process and equal protection claims in seeking to strike down the ordinance. *Hadacheck*, unlike the instant case, was not a regulatory takings case in which a landowner was seeking just compensation.

B. The Colorado court of appeals decided an important federal takings question in a way that conflicts with relevant decisions of this Court

The Court should grant this Petition because the Colorado court of appeals based its decision, in part, on an improperly stated rule of takings jurisprudence that is directly contrary to the holdings of this Court. Importantly, the Colorado court of appeals' based its error with respect to this important rule on the Colorado Supreme Court's decision in *Animas II*.

In *Animas III*, the Colorado court of appeals rejected AVSG's argument that the fact that the County enacted the plan "for aesthetic purposes and not to prevent some important public harm" should be considered as a factor in determining whether a taking had occurred. App. 8a. The court of appeals reasoned that this fact was not relevant to a takings determination because in *Animas II* the Colorado Supreme Court held that the Plan "serves a legitimate governmental purpose," 38 P.3d at 66, n. 5, App. 8a, and because the trial court found that the Plan was lawfully enacted. App. 9a. The court of appeals also found that *Lingle* was inapposite. App. 8a.

The Colorado court of appeals and the Colorado Supreme Court misstated this important rule of takings jurisprudence. As this Court stated in *Lingle*:

> We hold that the "substantially advances" formula is not a valid takings test, and indeed conclude that it has no proper place in our takings jurisprudence.

Lingle, 544 U.S. at 548.

In its decision in *Lingle*, this Court noted that it "arguably" applied the "substantially advanced" formula in *Keystone*. *Id.* at 545-46. The Colorado Supreme Court cited the *Keystone* case in *Animas II* when it held that fact that the Plan "serves a legitimate government purpose" weighed in favor of finding that the Plan did not effect a taking of AVSG's property. Thus, the "substantially advance legitimate state interests" formula (or, as the Colorado court of appeals and Supreme Court

framed it, "serves a legitimate government purpose" formula) no longer has a place in takings determination.

This Court should grant the Petition and decide whether a takings has occurred under the facts of this case, using the Court's holding in *Lingle* to assist in that determination.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

WILLIAM E. ZIMSKY
Counsel of Record
900 Main Avenue
Suite E
Durango, CO 81301
970.259.7222

Supreme Court of Colorado,
En Banc.
ANIMAS VALLEY SAND AND GRAVEL, INC., a Colorado corporation, Petitioner
v.
The BOARD OF COUNTY COMMISSIONERS OF the COUNTY OF LA PLATA, Colorado,
Respondent.
No. 06SC403.
Nov. 13, 2006.

Court of Appeals Case No. 04CA2437 (4/6/06). *1 Petition for Writ of Certiorari DENIED. JUSTICE COATS would grant as to the following issues:

Whether in light of the United States Supreme Court's recent holding that the question of whether a regulation substantially advances a legitimate state interest is not a valid takings test and has no proper place in our takings jurisprudence, the court of appeals erred when it held that the fact that the complained of regulation serves a legitimate government purpose militates against finding that a taking had occurred.
Whether where the United States Supreme Court has recognized four distinct categories of takings claims, including separate categories for cases involving physical invasions of property and for regulatory takings claims, is the question of whether a regulation imposes a physical invasion of a landowner's property properly within the scope of a regulatory takings determination.
Whether a zoning regulation, enacted for aesthetic purposes and not to prevent some important public harm or injury, that adversely affects a landowner's

reasonable investment-backed expectations and diminishes the value of his property by 70.6%, effects a compensable regulatory taking.

Whether the county's zoning of petitioner's property constituted a regulatory taking under either the Colorado or United States constitutions.

COLORADO COURT OF APPEALS
Court of Appeals No.: 04CA2437

La Plata County District Court No. 96CV45 Honorable Gregory G. Lyman, Judge

Animas Valley Sand and Gravel, Inc., a Colorado corporation, Plaintiff Appellant,
v.
Board of County Commissioners of the County of La Plata, Colorado, Defendant-Appellee.

JUDGMENT AFFIRMED Division IV Opinion by: JUDGE VOGT Casebolt and Furman, JJ., concur NOT PUBLISHED PURSUANT TO C.A.R. 35(f) Announced: April 6, 2006

William E. Zimsky, P.C., William E. Zimsky, Durango, Colorado, for PlaintiffAppellant

Goldman, Robbins & Rogers, P.C., Michael A. Goldman, Lindsey K. S. Nicholson, Durango, Colorado, for Defendant-Appellee

Hall & Evans, L.L.C., Thomas J. Lyons, Denver, Colorado, for Amicus Curiae Colorado Counties, Inc.

Geoffrey T. Wilson, Denver, Colorado, for Amicus Curiae Colorado Municipal League

In this inverse condemnation action, plaintiff, Animas Valley Sand and Gravel, Inc., appeals the trial court judgment, entered on remand following appeal, in favor of defendant, the Board of County Commissioners of the County of La Plata, Colorado. We affirm.

I.

In 1993, the County adopted the Animas Valley Land Use Plan. The Plan designated thirty-three acres of plaintiff's property as "river corridor district" land, thereby precluding plaintiff from using that land for its sand and gravel operation.

Plaintiff filed an inverse condemnation action. The trial court held that the Plan did not effect a compensable taking because it did not foreclose all reasonable use of plaintiff's property. On appeal, a division of this court agreed with the trial court that a taking can occur only when there is a deprivation of all reasonable use of the property, but it reversed and remanded for further findings under the proper evidentiary standard. Animas Valley Sand & Gravel, Inc. v. Board of County Commissioners, 8 P.3d 522 (Colo. App. 2000) (Animas 1). On certiorari review, the supreme court held that a compensable taking could occur even if the property at issue retained some economically viable use. It remanded the case to the trial court with directions to retry the case using a prescribed factspecific inquiry to determine whether a taking had occurred. Animas Valley Sand &, Gravel, Inc. v. Board of County Commissioners, 38 P.3d 59 (Colo. 2001) (Animas II).

At the trial on remand, the court heard testimony from numerous witnesses, including experts for both sides. In a thirtyeight-page written order, it engaged in the inquiry mandated by Animas II and concluded that, although the value of plaintiff's property had been reduced by 70.6% as a result of the Plan, such reduction in value did not result in a regulatory taking. Plaintiff's claims for compensation were accordingly denied.

II.

On appeal, plaintiff contends that the trial court erred in (1) failing to find a taking under the "particular and unusual" facts of the case and (2) rejecting use of the discounted cash flow approach to value the property. We disagree.

A.

To determine whether the Plan effected a taking of plaintiff's property, the trial court was required to, and did, engage in the inquiry and analysis prescribed in Animas II. That case controls our resolution of plaintiff's appeal as well. In it, the supreme court set forth the following principles relevant to the issues raised on appeal:

- A per se taking occurs when a regulation does not substantially advance legitimate state interests, or when it deprives a landowner of all economically viable use of its land. However, even if the landowner is unable to prove a per se taking, the landowner still may be able to prove a taking has occurred under a fact-specific inquiry. Such inquiry is intended to provide a "safety valve to protect the landowner in the truly unusual case" in which, "when [the property's] diminished economic value is considered in connection with other factors, the property effectively has been taken from its owner." Animas II, supra, 38 P.3d at 66.
- A mere decrease in property value is not enough to establish a taking under this fact-specific inquiry; rather, the level of interference must be "very high." Although no specific diminution in economic value must necessarily be shown to establish a compensable taking, the United

States Supreme Court has declined to find a taking in cases where property values were reduced by 85%, 75%, and 92.5% respectively. Animas II, supra, 38 P.3d at 65-66.

- In determining whether a taking had occurred in this case, the trial court was directed to consider the economic impact of the Plan. Assuming that at least some restrictions on plaintiff's use of its property were attributable to the Plan, the court was then to quantify the diminution in the fair market value of the property caused by the Plan.
- If the diminution in value was both substantial and attributable to the Plan, plaintiff then had to prove that its reasonable investment-backed expectations were adversely affected by the Plan.
- Plaintiff and the County could choose to raise other factors for the trial court's consideration, but no one factor would be dispositive, because "[e]ach case must be decided on its own facts." Animas II, supra, 38 P.3d at 67.

1.

The trial court's findings and conclusions are consistent with the analysis prescribed in Animas II.

As relevant here, the trial court first concluded that there was no per se taking because the Plan was enacted for a legitimate governmental purpose and it did not "render [plaintiffs] land economically idle."

Relying on the royalty income method of appraisal but not on the "discounted cash flow" method, and citing evidence of plaintiff's offer to sell the property for $1,000,000, the court found that the fair market value of plaintiff's property in 1993 without the Plan was $850,000. It further found that the property's post-regulation reasonable market value as a home site, based on the comparable sales method of appraisal, was

$250,000. This diminution in value, the court found, was attributable to the Plan.

The court next concluded that plaintiff had reasonable, investment-backed expectations that, in the absence of the Plan, it could have "designed, permitted and operated a profitable sand and gravel mine" on the property. The Plan interfered with these expectations.

Nevertheless, the court concluded, no taking had occurred. Plaintiff was not entitled under the law to compensation for diminution in value of the land's highest and best use. While that use had been eliminated by the Plan, and while the property's value had been reduced by 70.6%, the property retained substantial value as a home site.

2.

We are not persuaded by plaintiff's contention that reversal is warranted because the trial court focused unduly on the 70.6% reduction in property value rather than considering the "totality of the circumstances" and other factors that would have established a taking under the facts of this case.

We agree with plaintiff that "the percentage of diminution in value is not a pass/fail test pegged at a certain do-or-die percentage mark." However, Animas II makes clear that the diminution in value attributable to the government regulation must be "substantial" before a taking can be found. Animas II, supra, 38 P.3d at 67. Plaintiff cites no case, nor have we located any, in which a taking was found where the property at issue still retained nearly 30%of its preregulation value.

More important, even assuming that other factors could establish a taking where the property retained as much value as it does here, Animas II

makes clear that no combination of factors will conclusively establish a taking, and that "[e]ach case must be decided on its own facts." Animas II, supra, 38 P. 3d at 67.

Plaintiff contends that its riverbank stabilization plan would not have caused "much, if any, public harm" and would actually have benefited the public; that plaintiff is a "multi-generational family-owned business," whose principal had consistently voiced his opposition to the Plan; and that the Plan severely damaged the principal's retirement plans and the family business. Although the trial court did not reference these factors in its final conclusion that no taking had occurred, its findings and conclusions as a whole make clear that it acknowledged them. We cannot conclude that the trial court was required to find, based on these or any additional factors cited by plaintiff, that this case fell into the "rare category" of cases in which the land retains value but the totality of the circumstances nevertheless evidences a taking. Animas II, supra, 38 P.3d at 67.

Finally, we note that, to the extent plaintiff now challenges the legitimacy of the Plan by asserting that its rationale was only "for aesthetic purposes and not to prevent some important public harm or injury," such argument would be foreclosed not only by plaintiff's failure to raise it in the trial court but also by the supreme court's determination that the Plan "serves a legitimate governmental purpose." Animas II, supra, 38 P.3d at 66 n.5. We perceive nothing in Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 125 S.Ct. 2074, 161 L.Ed 2d 876 (2005), relied on by plaintiff at oral argument in this court, that warrants a contrary conclusion. Further, the trial court noted that the Plan

was determined to have been "lawfully enacted" in a C. R.C.P. 106(a)(4) proceeding in that court.

B.

Nor are we persuaded by plaintiff's contention that the trial court's rejection of the discounted cash flow approach was "flawed" because it was inconsistent with its other findings and because it lacked the specificity necessary for appellate review.

Animas II required the trial court to quantify the diminution in the property's fair market value caused by the Plan, but it did not require that the trial court use any particular appraisal method.

The three common approaches to valuing real estate are the market approach (based on comparable sales), the cost approach (cost of construction or reproduction less depreciation), and the capitalization of income approach. One or more of these approaches may by inapplicable in a given case. City of Englewood v. Denver Waste Transfer, L.L.C., 55 P.3d 191 (Colo. App. 2002); see Denver Urban Renewal Authority v. Berglund-Cherne Co., 193 Colo. 562, 568 P. 2d 478 (1977).

> Depending on the location and type of property involved, appraiser may use any one, two, or all three methods to determine the fair market value of the property. State Department of Highways v. Mahaffey, 697 P.2d 773 (Colo. App. 1984).

The trier of fact has the duty to weigh the opinions and judge the credibility of expert witnesses on value in order to determine which of the three approaches is most indicative of the actual market value of the property at issue. Denver Urban Renewal Authority, supra. We may not reweigh the evidence on

appeal. See State Department of Highways v. Mahaffev, supra.

At trial here, both plaintiff's expert and the County's expert testified at length regarding the various applicable appraisal methods; the reasons why they viewed a particular method as preferable, given the nature of plaintiff's property; and the assumptions on which they relied in reaching their valuations under the various methods.

Plaintiff's expert did not consider the comparable sales approach suitable in this case. He also explained that the cost approach was rarely used in appraising mineral property, but that two "income approaches" were potentially applicable for such purposes: (1) the royalty income approach, which assumes that the mineral owner does not have the financing, knowledge, expertise, or equipment to be a mining company but would, instead, lease the reserves to a mining company under a royalty arrangement and (2) the discounted cash flow approach, which capitalizes the projected mining income to the owner or lessee of a property who has the ability, knowledge, and wherewithal to mine the property itself. The expert testified that the discounted cash flow approach should be used "where the owner of the property is a mining company or either active or proposed to mine the property." However, he valued the property using both income approaches, and opined that the value was $678,900 using the royalty income approach and $2,264,800 using the discounted cash flow approach.

The County's expert appraiser disagreed with plaintiff's expert on several issues. He concluded that the Plan did not cause a diminution in the market value of the property, and that plaintiff did not have reasonable investment-backed expectations for mining

the property immediately before and at the time of the Plan's adoption. As to valuation, he disagreed with plaintiff's expert regarding the viability of the discounted cash flow method, and he considered it appropriate to rely on comparable sales in valuing the property. Although the County's expert considered the royalty income method preferable to the discounted cash flow method, he had valued the property using both, arriving at a pre- and post-Plan value of $60,000 using the former method and $90,000 using the latter method.

Upon consideration of all the valuation testimony, the trial court concluded that the discounted cash flow method was inappropriate for calculating the preregulation value of the property because it "rests on too many assumptions for which the evidence is simply too speculative." Instead, the court relied primarily on the royalty income approach, but it also took into account plaintiff's offer to sell the property in the early 1990s for $1,000,000. Based on these considerations, the court concluded that the preregulation reasonable market value of the property was $850,000.

Given the conflicting testimony presented at trial, it was well within the trial court's discretion to weigh the evidence and choose from among the appraisal methods, all of which were permissible under Colorado law, the method most suited to value plaintiff's property. See Denver Urban Renewal Authority, supra. The court was not required to accept plaintiff's expert's opinion that the discounted cash flow approach was preferable.

Contrary to plaintiff's contention, we do not perceive the court's conclusion rejecting use of the discounted cash flow approach as inconsistent either with the evidence at trial or with the court's specific

factual findings. Plaintiff notes that the trial court found portions of its expert's testimony "credible and reasonable," and that the court accepted portions of his testimony. However, the findings cited by plaintiff are entirely consistent with the court's determination that, notwithstanding the County's expert's contrary views, the Plan adversely affected plaintiff's property value and adversely affected plaintiffs reasonable investment-backed expectations. The findings are also consistent with the court's decision to use a preregulation value -- $850,000 -- that was more in line with plaintiff's values than the County's.

Additionally, the reasons cited by the court in rejecting the discounted cash flow method as speculative -- namely, that there were (1) substantial uncertainties concerning the quality and extent of material reserves on the property, (2) substantial uncertainties facing "any operator in getting a mining operation permitted, constructed, and product brought to market at a sufficient level of profitability" -- are supported by the record and are sufficiently specific to permit appellate review. The County's expert testified, for example, that the type of fine sand found on plaintiff's property was unlike the coarse material for which a market existed. He also explained why the discounted cash flow method was "typically frowned upon by the regulators" as a way of determining the value of a mining operation, and he opined that plaintiff's expert had not factored in the high risk faced by mining companies attempting to break into the market with their product.

Because the concerns cited by the trial court are sufficient to support its decision to reject use of the discounted cash flow method, we need not remand for findings on the additional issues raised by plaintiff.

The judgment is affirmed.

JUDGE CASEBOLT and JUDGE FURMAN concur.

SEP 2, 2004

Case Number 96CV45

DISTRICT COURT, LA PLATA COUNTY, COLORADO

Court address 1060 E. 2nd Ave., Durango, CO 81301
Phone No.: (970) 247-2304

Plaintiff. ANIMAS VALLEY SAND AND GRAVEL, INC., a Colorado corporation

Defendant THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF LA PLATA, COLORADO

ORDER - TRIAL TO COURT

The case is before the Court for resolution after a trial to the Court. Plaintiff originally filed its petition for condemnation in 1996, alleging a regulatory taking of its property in La Plata County, Colorado. The original petition was brought pursuant to Article II, Section 15 of the Colorado Constitution. After a trial to the court in March of 1999, the Court ruled that no taking had occurred. Plaintiff appealed, and in February of 2000 the Court of Appeals remanded the case to the trial court to clarify the burden of proof the court had employed in making its original findings, and to reconsider its findings accordingly. Because the substantive law applied by this Court was approved by the Court of Appeals, Plaintiff again sought review in the Colorado Supreme Court, which was granted. In December 2001, the Supreme Court reversed both the

appeals court and the trial court and remanded the case for trial for a fact-specific inquiry into whether or not the regulations enacted by the Board of County Commissioners had gone too far in reducing the uses to which Plaintiffs land could be put and hence reducing its value.

By order of December 31, 2002, Plaintiff was allowed to amend its petition to seek compensation for the alleged regulatory taking under both the Colorado Constitution and the Fifth Amendment to the United States Constitution. The case came before the Court for trial on January 27 through January 31, 2003. Plaintiff appeared through its owner, James Hanks, and was represented by Attorney William Zimsky. The defendant County was represented by Attorney Michael Goldman. The Court heard the testimony of many witnesses, admitted many exhibits into evidence, took a site visit to the subject and other properties, and having considered said testimony, exhibits and observations, as well as the testimony and exhibits from the first trial, and the authorities, statements, stipulations and arguments of counsel, is fully advised in the premises. The Court now FINDS and ORDERS as follows

FINDINGS OF FACT

1. In 1961, Plaintiff Animas Valley Sand and Gravel, Inc. (hereinafter "AVSG") purchased approximately 46.5735 acres of real property in La Plata County, Colorado, for $6,000 (hereinafter "the Original AVSG Property").

2. Prior to the time AVSG purchased the Original AVSG Property, AVSG 2 had leased part of the property as a sand and gravel pit operation.

3. In 1979, pursuant to County approval, AVSG subdivided the property into two tracts Tract A, comprising 4.6493 acres of land, more or less; and Tract B, comprising 41.9240 acres of land, more or less. This subdivision is known as the Hanks Project Survey, Category 1, Project 178, recorded at Reception No. 427267. In 1979, Plaintiff AVSG sold Tract A to James Hanks, who is currently the President and majority shareholder of AVSG.

4. Tract A consists of a portion of the Original AVSG Property.

5. Tract B has not been further subdivided and is one contiguous parcel of land consisting of 41.9240 acres, more or less, and is owned by AVSG.

6. AVSG has a permit from the Mined Land Reclamation Division which allows AVSG to mine sand and gravel in an area 10 acres in size ("the 110 Permit Area"). Approximately 8 acres of the 110 Permit area is located on Tract B. The remaining portion of the 110 Permit area is located on Tract A. AVSG does not now, nor has it ever, had any additional permits issued from the Mined Land Reclamation Division which would allow the mining of sand and gravel on the other portions of Tract B. The two tracts and the 110 Permit Area are delineated in Exhibit DD-45.

7. On November 4, 1993, the County adopted the Animas Valley Land
Use Plan (hereinafter "AVLUP"). (Exhibit CC-19.)

8. The AVLUP designated approximately 8 acres of Tract B as Industrial 3 District. Property designated as Industrial District may be mined for sand and gravel. The AVLUP designated properties as Industrial District if they were permitted for sand and gravel mining by the Colorado Division of Minerals and Geology and the Mined Land Reclamation Division.

9. At the time the AVLUP was adopted by the County, AVSG had a Section 110 Permit for sand and gravel mining purposes which covered portions of Tract A and portions of Tract B. Only approximately 8 acres of the property in Tract B is covered by the 110 Permit, and these acres were designated as Industrial District by the AVLUP. The remaining portion of Tract B, approximately 33 acres, is not covered by the Section 110 Permit. This portion of Tract B was designated under the provisions of AVLUP as River Corridor District.

10. Mining sand and gravel and mining heavy minerals is prohibited upon property located within the River Corridor District.

11. After the AVLUP was adopted by the Board of County Commissioners (hereinafter "BOCC"), AVSG applied to the County to change the AVLUP so as to designate the entire Tract B as part of the Plan's Industrial District. AVSG's request that the AVLUP be changed was based on its assertion that portions of Tract B were used as a sand and gravel pit since at least 1960 and that pursuant to C.R.S. 30-28-120, AVSG was entitled to have its nonconforming use grandfathered in as a permitted use.

12. By Resolution 93-2, the County's Planning Commission recommended that the Plan be changed so that all of Tract B would have been designated as part of the Industrial District.

13. By Resolution 1994-16, adopted on or about February 28, 1994, the County denied AVSG's request that the Plan be changed so as to designate all of Tract B as being part of the Industrial District because the County concluded that Plaintiff had not shown sufficient use of all of Tract B as a mining operation to be "grandfathered."

14. Pursuant to C.R.C.P.106(a)(4), AVSG sought certiorari relief from the Board's decision not to change the Plan so as to include all of Tract B in the Industrial District (Case No. 94CV69, La Plata District Court).

15. On March 20, 1995, the District Court denied AVSG's request for certiorari relief. On June 30, 1995, the District Court denied AVSG's Motion for Reconsideration. AVSG did not appeal this ruling.

16. The County is a governmental body with the power of eminent domain.

17. The 33 acres of Tract B designated as River Corridor District have the following uses by right One dwelling unit per existing legal lot of record or per 35 acres, whichever is less, granny flats, commercial livestock, and agriculture -related operations and accessory structures.

18. The 33 acres of Tract B designated as River Corridor District have the following uses by special use permit Bed and breakfasts of no more than ten guest 5 rooms, plant nurseries, greenhouses, public and quasi-public facilities, professional offices, and low-intensity tourist- oriented recreational uses.

19. All but approximately 2.5 of the 41.9 acres of Tract B consists of three distinct areas 1) an island formed by two channels of the Animas River 2) the two channels themselves; and 3) land lying east of the eastern channel, accessible only by crossing both of the river channels (Exhibit DD-45).

20. John Hanks, father of James Hanks, was involved in the sand and gravel business in La Plata County, Colorado, since shortly after world War II. He worked and operated various sand and gravel pits before leasing and eventually purchasing the site that is the subject of this litigation. John Hanks formed the plaintiff corporation in approximately 1960 for the

purpose of purchasing the Original AVSG Property. John Hanks was the president and majority shareholder in AVSG at the time of its formation, and his son, James Hanks, was vice president. In 1961, AVSG purchased the Original AVSG Property, which includes Tract B, the property which is the subject of this action.

21. Over the years, AVSG has mined sand and gravel from various parts of the AVSG original property, and there is stockpiled material on the property. AVSG has owned and operated a variety of equipment in connection with its sand and gravel operations on the Original AVSG Property. (Exhibits 6 through 9,15,17 through 19, 21 through 24, and 50.)

22. Deposits of heavy minerals are located on the subject property, including gold, silver, iridium, platinum, mercury, tungsten, iron, and copper. At various times, AVSG mined the Original AVSG Property for heavy minerals and contracted with other miners who operated a gold mining dredge on the subject property. AVSG purchased various types of equipment for gold mining, including two Denver Jigs weighing 8,000 pounds apiece, spiral wheels, a Wilfrey table, a Wiley bowl, and Steffen tables. (Exhibits 12 and 14.)

23. In 1985, John Hanks retired at the age of 78 and James Hanks took over the management of AVSG. Prior to the adoption of the AVLUP, James Hanks became the majority shareholder of AVSG.

24. James Hanks has lived in La Plata County, with intermittent absences, his entire life. He served in the Army from 1956 to 1959, graduated from Fort Lewis College with a degree in accounting and economics, obtained a master's degree from the University of Oregon in public administration and international

relations (1968 through 1970), whereafter he went to work for the United States Department of State, Agency for International Development. James Hanks was so employed from 1970 to 1985, during which time he worked all over the world on natural resources projects, dam constructions, road and river crossings, harbor studies, and the delineation of underground aquifers. In 1985, James Hanks retired from the United States Department of State, Agency for International Development, and returned to La Plata County to assist his father in a variety of family businesses, including AVSG.

25. Upon his return to La Plata County, James Hanks' primary concern was stabilization of the river bank on the west side of the west channel near his home on Tract A in order to prevent erosion. In March of 1987, James Hanks was cited by the Mined Land Reclamation Division for operating without a permit. (Exhibit BB.) James Hanks acknowledged the violation and paid a fine. He thereafter submitted an application to the State of Colorado, Department of Natural Resources, Mined Land Reclamation Division, for a "112 Permit" covering the entire subject property. He later withdrew the 112 application and submitted a 110 application, resulting in the issuance of a Section 110 Permit on January 13, 1988. (Exhibits 45 and 46.) The 110 Permit covers 10 acres of the Original AVSG Property, including 8 acres on Tract B, and remains in effect to this date.

26. In the early 1960s, AVSG leased a portion of the Original AVSG Property to Siegrist Construction, which mined material for road base for the construction of Highway 550, which now runs adjacent in a north-south direction to the west of the subject property.

Substantial amounts of high-quality sand and

gravel was mined from the property during the time the highway was constructed. During the Siegrist operation, the river was rechanneled through what is now the east channel of the river on the subject property, and material was mined out of the north section of the island as it then existed. (Exhibits 39A and 40A, 40, 41 and 42.) Throughout the 1960s and '70s, John Hanks, with the intermittent assistance of James Hanks, mined various portions of the Original AVSG Property for sand and gravel. They operated a dredge in the Animas River to extract sand and gravel from the southern portion of the Original AVSG Property. (Exhibits 6 and 8.) 27. In the early 1990s, AVSG entered into an agreement with Eugene Bonds, owner of Bonds Construction, to remove sand and gravel from the subject property at a royalty rate of $1 per cubic yard. (Exhibit R.) Mr. Bonds extracted sand and gravel from the 110 Permit Area. Mr. Bonds was familiar with sand and gravel for use in his construction business, and indicated that the material extracted from Plaintiffs permitted area was of high quality.

28. From 1985 to 1993, AVSG was primarily in the business of erosion control and, aside from the lease to Bonds, not the sale of sand and gravel.

29. AVSG never applied for a 112 Permit for the entire Tract B after its initial application in 1987 was withdrawn.

30. AVSG was never profitable. Its tax returns from 1988 through 2000 (Exhibit P) indicate business losses in each year except for 1990, when income in the amount of $365 was realized. (Exhibit P.)

31. Aside from the efforts at erosion control described above and the lease to Bonds, Mr. Hanks was not active in the operation of AVSG between 1985 and 1993. He was working on other family projects,

including a mobile home park, during that time. James Hanks testified that it was always his intent to fully mine the subject property prior to the adoption of the AVLUP.

The adoption of AVLUP was preceded by a series of studies, recommendations, public meetings and opportunities for input and objections by affected landowners. James Hanks participated in these proceedings and consistently opposed the enactment of AVLUP, at least to the extent it prohibited the expansion of mining operations on Tract B.

32. At the trial AVSG presented testimony concerning two proposals for a mining plan on Tract B. The first was discussed and described by Stewart Limb. AVSG then modified the mining plan and presented a proposal prepared by Gregory C. Lewicki. The "Lewicki plan" generally involved stabilizing the exterior perimeter of the island on Tract B and mining out the interior, eventually creating a lake in the middle of the island. It also contemplates mining out the property to the east of the east channel, which resulting lake would be contained by the east bank of the east channel and that portion of Tract B which lies on its eastern perimeter. (The Plan is depicted and described in Exhibits DD-47, 64, 65 and 66.)

33. The parties dispute whether or not the Lewicki plan was feasible given the regulatory environment and variety of permits which would have been necessary to obtain in order to proceed with such a plan in 1993, at the time AVLUP was adopted.

34. The Court heard credible testimony on both sides of the regulatory feasibility issue.

35. The regulations pertinent to obtaining a permit arise both in the federal and state statutes. As a general proposition, the regulatory challenges have

become increasingly difficult over the years, and undoubtedly were less difficult to achieve in 1993 than they would be today. The Clean Water Act of 1972 (33 U.S.C. 1344(b) and 1361(a)) was enacted by the United States Congress to "restore and maintain the chemical, physical, and biological integrity of the nation's waters." Section 404 of the Clean Water Act regulates the discharge of dredged and fill material into the waters of the United States and establishes a permit program to insure the discharges comply with environmental requirements. The 404 permit program is administered by the U.S. Army Corps of Engineers, with oversight from the U.S. Environmental Protection Agency. The Corps of Engineers (hereinafter "COE") is primarily responsible for the permit program and is authorized to issue permits for the discharge of dredged and fill material. The Environmental Protection Agency ("EPA") has oversight responsibility for the permit process, and reviews proposed permits, evaluates alternatives to discharges, and shares enforcement authority with the COE. The COE's evaluation of a permit application involves a rigorous two-part test that requires COE to determine whether the activity complies with Section 404(b)(1) guidelines and to conduct a public interest review. Although sometimes permits are issued nationally or regionally, and can be obtained simply by compliance with the permit criteria, the COE can also require that any particular application for mining activity be subject to the requirements of an individual permit, wherein the specific proposed mining activity involved would be carefully scrutinized and analyzed on its own merits. If the Section 404(b)(1) guidelines are complied with, the COE then engages in a public interest review, which is a balancing test in which public and private benefits of

a proposal are weighed against its adverse effects on the environment. An environmental assessment is required to determine whether the project would have significant environmental impacts, whether such impacts can be readily mitigated, and an environmental impact statement may be required. The jurisdiction of the COE in the permitting process is triggered by any activity which would create discharge into the waters of the United States. Dredged or fill material should not be so discharged unless it can be demonstrated that no other less damaging alternatives exist to achieve the basic project purpose and that such discharge will not have an unacceptable adverse impact on the aquatic environment. Section 401 of the Clean Water Act must also be complied with prior to permit issuance, which requires that prior to permit issuance, the State must certify that the activity complies with its water quality standards. Issues of bank stabilization, and the proper permit therefor, are integral parts of such an application and consideration by the COE.

36. These federal regulations were made more restrictive by the advent of the "Tulloch Rule" (58 FR 45008) which applied to most excavation activities and regulated incidental fallback or de minimis fill that inevitably occurs during excavation activities. The result was that smaller or incidental discharges into the waters of the United States were more tightly protected under the new regulation, which was changed by legislation to be less restrictive, in May of 1999. Between 1993 and 1999, the regulatory environment to obtain a permit of the type necessary to implement the Lewicki plan would have been much more restrictive than it was before, or has been since.

37. State regulation of mining activities began in 1976 with the enactment of the Colorado Mined Land

Reclamation Act. (C.R.S. 34-32-101.) The Colorado Land Reclamation Act, which created a more controlled environment for the extraction of materials, was enacted in 1995 by the state legislature. Also in 1995, the Mined Land Reclamation Board promulgated "Construction Material Rules and Regulations", which have been modified in 1999, 2000 and 2001 to better regulate materials extraction activities. The state regulations are primarily concerned with reclamation and are designed to insure that a mining operation does not disturb the site in such a way as to violate either federal law or fail to return the site to an acceptable state after the conclusion of the mining activity. Several types of permits are available pursuant to state regulation, two of which are generally referred to as a 110 Permit and the 112 Permit. The 110 Permit (C.R.S. 34-32.5-110) is an expedited process for smaller types of mining operations, not to exceed 10 acres in size. The 112 Permit pertains to larger operations and requires an application to the Mined Land Reclamation Board, now known as the Division of Mining and Geology, for a site-specific review of the proposed mining activity.

38. In addition to federal and state regulations, AVSG would also have had to obtain a Class II permit for an expanded 112 mining plan from La Plata County, even before adoption of AVLUP. The impact of a proposed plan on traffic and other matters would have been considered prior to the issuance of such a permit. It does not appear that obtaining a Class II permit would have been a large obstacle for AVSG, prior to the adoption of AVLUP.

39. Thus, mining activity on Tract B was unregulated until 1972 when the federal regulations came into being, and 1976 when the state regulations came into being. James Hanks had been involved in the

mining operation owned by AVSG prior to going to work for the State Department between 1970 and 1985. When he returned, his sand and gravel activities at the site primarily were concerned with stabilizing the river bank closest to his home on Tract A in order to prevent erosion into that area. As discussed above in paragraph 25, this activity was commenced without any permit of any sort, and the Mined Land Reclamation Division (now the DMG) cited AVSG for operating without a permit. James Hanks acknowledged the violation and promptly applied for a 112 Permit, and paid a fine for the unpermitted activity in which he had been engaged. The 112 Permit application was later withdrawn by AVSG, which then applied for and obtained a 110 Permit. The 110 Permit remains in effect, and the AVLUP did not purport to interfere with the operations allowed under that permit. No uses to which Tract B was being put prior to the enactment of AVLUP are prohibited or foreclosed by said regulation. The enactment of AVLUP did not result in any physical invasion of Tract B.

40. From 1988 forward, much communication and correspondence occurred between AVSG and MLRDIDMG. AVSG sought to expand its permitted activities into the east channel, which expansion was consistently rejected by MLRDIDMG as outside the permit area. The east channel was also of concern to AVSG's neighbor to the south, Anthony Ganzerla. Mr. Ganzerla and AVSG were and continue to be in conflict as to the effect upon the downstream property of Ganzerla of the east channel on Tract B. It is Mr. Ganzerla's position that the east channel causes substantial downstream degradation of his property.

41. AVSG has a long and unresolved history of communication with the COE concerning necessary

permits on Tract B. AVSG engaged in three permit processes with COE, none of which was ever ultimately issued. AVSG and the COE quarreled over matters relative to the east channel and a partial dike placed in the river near the mouth of that channel. AVSG and COE disagreed as to whether or not COE even had jurisdiction. COE alleged but never prosecuted several violations by AVSG of the federal regulations. Before, during and after the adoption of AVLUP, communication between AVSG and the COE concerning the nature and scope of permissible mining activities upon Tract B never resulted in the two parties reaching agreement. On December 12, 1996, AVSG was offered a Section 404 permit from the COE allowing up to 6500 cubic yards per year of sand and gravel extraction within the river channel. By this time AVSG had exhausted its efforts to change the AVLUP designation of Tract B from River Corridor to Industrial District (see paragraphs 7-15 above). On December 26, 1996, AVSG informed the COE that the terms of the permit were unacceptable and the permit was never activated.

42. As late as 1996, despite the enactment of the AVLUP, AVSG requested a conversion of its 110 Permit to a 112 Permit to mine the entire property and convert the mined area into wetlands. This application was withdrawn, and ultimately AVSG informed DMG that it would close its pit. With regard to the existing 110 Permit, it is the position of AVSG that, due to previous mining activities, that that permit can no longer be profitably operated.

43. Whether or not the Lewicki plan could have been implemented with the proper permits before or after the implementation of the AVLUP is the subject of substantial conflicting testimony in the record. On

this subject the Court heard the testimony of Greg Lewicki, a professional engineer, Ryan Unterreiner, an expert in wetland science, Brian Kimmel, who testified as an expert in the obtaining of sand and gravel mining permits, Paul Sugnet, an environmental consultant who testified as an expert in the Clean Water Act and DMG mining and permitting requirements, Leslie McWhirter, an employee of the COE who is the project manager in southwest Colorado for implementation of the 404 Clean Water Act, and Tom Gillis, a senior environmental protection specialist with the DMG. Both representatives of the agencies, McWhirter and Gillis, were limited in their testimony by the requirements of their agencies that they not indulge in speculation as to whether or not, on a hypothetical basis, a given permit would have issued.

44. The testimony of the representatives of the regulatory agencies was of little assistance to the Court. The other witnesses, each of whom gave credible testimony, not surprisingly differed over the likelihood of AVSG's mining plan being permitted either before or after the implementation of the AVLUP. The existence of the AVLUP in and of itself would have resulted in the necessary permits not being issued. Because AVSG and Mr. Hanks, as described above, continued to challenge the AVLUP in the courts for a number of years after its implementation, and believed that the restrictions it placed upon mining activities would ultimately be withdrawn, AVSG persisted in its attempts to become permitted by the COE and DMG for several years after the implementation of AVLUP.

45. All of the experts who testified concerning the regulatory environment agreed that the fact that AVSG had had prior violations and a history of conflict with the regulatory agencies over the years should not

have been an impediment to ultimately designing and getting a mining plan permitted. Witnesses differed somewhat as to whether or not, in actuality, this history of discord would be an impediment to AVSG obtaining the necessary permits. The witnesses propounded by AVSG, Ryan Unterreiner and Brian Kimmel, both indicated that the Lewicki plan could reasonably be permitted and that prior difficulties would not be an obstacle. Mr. Lewicki himself acknowledged that his proposed mining plan would, in all likelihood, require an individual permit from the COE, and hence increase scrutiny from that agency. It was the opinion of Mr. Sugnet who, like Mr. Kimmel, has been involved in numerous sand and gravel mining permit applications in and around La Plata County, Colorado, that the history of discord between AVSG and the permitting agencies is such that each of the agencies would in all likelihood view Tract B as a problematic site, with inherent difficulties in meeting permit requirements.

46. Based upon the testimony of all of the witnesses concerning the regulatory environment AVSG, or any owner of Tract B, would have had to navigate in order to become permitted according to the Lewicki or a similar mining plan had AVLUP not been implemented, the Court finds that significant obstacles would have had to be overcome. The permitting process would have been difficult and expensive, but in all likelihood not impossible. The Court finds that a mining plan could have been designed to meet permit requirements but at a greater cost both in time and money than suggested by AVSG. There is no doubt that substantial regulation of the sand and gravel industry was in place in 1993 and would have affected the ability of AVSG to obtain necessary permits regardless of the adoption of AVLUP. Nonetheless, since it appears that in the

absence of the AVLUP, AVSG could have permitted some mining plan, the AVLUP did result in a restriction upon the uses to which Tract B could be put.

47. The parties differ as to whether or not there are sufficient quantities of high-quality materials to be extracted from Tract B. After weighing such testimony, the Court finds that substantial quantities of high-quality materials have historically been mined from various parts of Tract B. The bulk of the road base material for the construction of Highway 550 North came from the subject property, material obtained from the subject property by Bonds Construction and Mountain Redi-Mix was of sufficient quantity and high quality as recently as the early 1990s, and a substantial portion of Tract B has never been mined. While it appears from the testimony that various mining activities in the river above Tract B have contributed to a change in the gradation of the river, with the likely effect that future deposits of sand and gravel on Tract B will not be of the same quantity or quality as those which led to the historic deposits on the property, there continue to exist such unmined deposits of high-quality material as to render Tract B a potentially valuable area to be mined for sand and gravel. The Court also finds that from the time period well before the enactment of AVLUP through the present day there has existed a market for sand and gravel products in the geographic area which could be served by a mine located on Tract B, and that while there were various other sand and gravel operations in La Plata County, had AVSG been able to permit and operate a mining plan, it would have enjoyed a share of that market.

48. The parties differ on whether or not AVSG had reasonable, investment-backed expectations for the use of its property as a sand and gravel mine. The historic

manner of extraction from mining operations on the site was by use of a hydraulic dredge. James Hanks submitted historical photographs indicating the use of such a dredge on the subject property by AVSG in the 1950s and '60s. (Exhibits 6 and 8.) AVSG put on unrebutted expert testimony that AVSG remains in possession of all the equipment necessary to undertake a hydraulic dredging operation in accordance with the proposed mining plan on Tract B. The expert, Mr. Turner, indicated that several hundred feet of discharge pipe would be the only remaining component AVSG would need to purchase in order to activate the hydraulic dredging operation contemplated in the Lewicki plan. While Mr. Turner was careful to indicate that an operator of such a dredge would have to be very careful not to disturb the exterior berm of the island in the operation of the dredge, and that he was unfamiliar with permitting requirements discussed above, that the dredging plan, in the context of the Lewicki plan, was feasible. None of the defendant's witnesses exhibited any particular expertise in the area of hydraulic dredging, and the Court finds that such a dredging operation is feasible technically, and would not have been an obstacle to regulatory compliance.

The County asserts that no evidence was tendered that indicated that Plaintiff had engaged in reliable testing or drilling to establish the extent and quality of the material reserves on Tract B, and that had Plaintiff been serious about permitting and mining Tract B in 1993 it would have been allocating substantial funds in such efforts at least by 1987. Its failure to do so, during a time period when other mining companies were opening and improving their sand and gravel properties in the same vicinity, is cited by Defendant as proof that Plaintiff did not have

reasonable, investment-backed expectations of conducting a profitable mining operation on Tract B.

49. The Court heard the testimony of four expert witnesses concerning the reasonable market value of Tract B as of the date of the enactment of AVLUP, November 4, 1993, both with and without said regulation. Plaintiff and defendant each elicited the testimony of accredited and well- credentialed mineral estate appraisers, and each elicited the testimony of accredited and experienced land appraisers. Not surprisingly, the witnesses differed greatly on their appraisal methods and their application in determining the values of Tract B before and after the enactment of AVLUP.

50. Plaintiff introduced the testimony of J. Stuart Limb for analysis of the mineral estate on Tract B and how it would have affected the fair market value of the property had AVLUP not been enacted. Defendant introduced the testimony of Trevor Ellis for the same purpose. Each relied upon the estimates of engineers and Mr. Hanks' historical observations to estimate the material reserves on the property. There has not been enough geological testing performed on the property to permit a statement of proven reserve amounts. Mr. Limb commented that his estimates were probable reserve amounts, and Mr. Ellis was less certain that reserves existed to the extent estimated by Mr. Limb. As discussed above in paragraph 32, Mr. Limb originally proposed a mining plan, which he revised both in view of the subsequently devised Lewicki plan, and the estimates of the engineer who had provided estimates upon which Mr. Ellis based his opinions.

51. The mineral estate valuation experts differed in the types of appraisal methods upon which they relied. Each rendered opinions based upon the various

methods. Essentially, three types of appraisal methods were discussed by the two experts, to wit: the royalty income approach, the discounted cash flow approach, and the comparable sales approach. Mr. Limb rendered opinions based upon the royalty income approach and the discounted cash flow approach, and downplayed the viability of the comparable sales approach as unworkable. It was Mr. Limb's opinion that the comparable sales approach was not valid when evaluating sales of sand and gravel property because too much information is unknown about any given transaction to consider them meaningfully comparable. Mr. Limb pointed to the comparable sales relied upon by Mr. Ellis and testified in some detail as to the information that was lacking with regard to each which might render the comparison invalid. Essentially the amount and quality of reserves, permit status, and the knowledgeable status of the buyer and seller were factors that were largely unknown, and in Mr. Limb's opinion rendered the sales comparisons invalid.

Mr. Ellis disagreed and relied on comparable sales both of sand and gravel property and residential property in reaching his conclusion of value. It was Mr. Ellis's opinion, essentially, that the per acre value of sales of comparably-sized property, located near Tract B close in time to November 4, 1993, revealed that the value of land in the area at that time was not dependent whatsoever upon the presence or absence of mineral reserves, and that the sales, be they of sand and gravel pits or residential land, demonstrated approximately equal land values on a per-acre basis.

52. Mr. Limb rendered opinions of value of Tract B based upon the royalty income approach and the discounted cash flow approach. The royalty income approach is based upon an assumption that the seller or

owner of property would not have the personal wherewithal to mine the property themselves, but would have to lease the property to a mining company in order to utilize and extract the reserves and bring them to market. The value to the owner under this approach would be based upon the price paid to the owner for royalties on the material extracted. Mr. Limb testified in great detail concerning the market factors which would affect such value pursuant to this approach, which the Court found credible and reasonable. Mr. Limb's opinion of the fair market value of Tract B on November 4, 1993, in the absence of the enactment of AVLUP, was $963,500. After making certain adjustments based upon concerns raised by the Lewicki plan, and adjusted for the reserve estimates utilized by Mr. Ellis, that opinion was revised during his testimony to $678,900.

It was Mr. Limb's opinion that because Mr. Hanks was himself an experienced sand and gravel miner, and that he had the equipment necessary, to wit, the dredge and associated items, that the discounted cash flow method was the more appropriate method by which to appraise Tract B. This method assumes a knowledgeable and capable buyer and seller and estimates, based on a wide variety of variables, what a knowledgeable buyer would pay to a knowledgeable seller for the property in question. Mr. Limb's original opinion was that the value of Tract B on November 4, 1993, in the absence of AVLUP, was $2,459,000. During his testimony, he adjusted that opinion downward somewhat, based on the Lewicki plan and volumetric adjustments, to slightly over $2 million.

Utilizing the same appraisal methods, but different assumptions, Mr. Ellis opined that the value of the mineral estate using the royalty income method

was $60,000 both before and after the institution of AVLUP; and utilizing the discounted cash flow approach that the value of the mineral estate both before and after the institution of AVLUP was $90,000. It was his ultimate opinion, however, that the sales comparison approach was the most viable for this particular property. Relying upon comparable sales of vacant land and sand and gravel property, and noting that the difference in land value appeared to be unaffected, it was Mr. Ellis's opinion that the value of the mineral estate added nothing to the value of the property, and that the value of Tract B on a per acre basis was unaffected by the presence of sand and gravel reserves, however rich and extensive. Mr. Ellis's disagreements with Mr. Limb's assumptions include his opinion that the materials on Tract B were not a premium product, only a very fine sand and of lesser value, that there was no accounting for the number of years it would take to plan, permit and develop the project to the point where it would earn revenues, that there was no realistic reconciliation for risk, that the assumption of Mr. Limb that the property could yield and be permitted for production of 100,000 tons of product a year was unrealistic, that the sand and gravel industry is inherently risky, and the assumption that an operator could realize income of over $4 a ton was unrealistic. Mr. Ellis also questioned whether or not the admittedly aged dredging equipment in possession of Mr. Hanks could stand up to the 15 years plus of work which would be necessary to fully exhaust the reserves.

53. The discounted cash flow method was also criticized as being too much like a business valuation as opposed to a valuation of land.

54. Each of the parties elicited testimony from MAI certified land appraisers. The Court heard the

testimony of Robert 0. Stevens for the Plaintiff and Maggie Love for Defendant. Each were knowledgeable and well-qualified appraisers. Both appraisers agreed that, after the enactment of AVLUP, the best and highest use for Tract B is as a residential home site. Both agreed that Tract B is unique in this regard in that much of the acreage of Tract B lies on the island and the land east of the river, which in order to be developed even as a home site would require the construction of a bridge. The appraisers did agree that a suitable building site exists on the southwest corner of Tract B, and Ms. Love opined that a building site could be engineered along the north portion of the property.

Again, the appraisers disagreed as to the appropriate method for valuing the property. Mr. Stevens rejected the comparable sales approach. While he agreed that river front property is generally desirable, it was his opinion that because of the access problems to the island and the east portion of the property, and the proximity of the river to the building envelope and the concomitant engineering difficulties required to build on that location, there was little likelihood that any truly comparable sales existed in the neighborhood in the appropriate time frame.

55. Mr. Stevens valued the approximately 6 acres of building site available in the southwest corner of the property at $26,000, or $4,333 an acre, and the remaining approximately 36 acres of what he termed "marginal land" at $1,733 an acre, yielding a post-AVLUP value as of November 4, 1993, of $88,395. Mr. Stevens adopted the opinions of J. Stuart Limb concerning the valuation of Tract B in the absence of AVLUP, at that date.

56. Maggie Love relied on the comparable sales approach and testified to five sales of land in the North Animas Valley at or near the date of the enactment of AVLUP. Three of these were vacant land sales and two of them were sales of sand and gravel property. All comparable sales were within two miles of the subject property and occurred between April of 1991 and October of 1993. Of particular interest was a sale from Dalton Land and Cattle Company to Dillon Ranches of approximately 165 acres, 155 of which contained a sand and gravel operation a short ways upriver from Tract B. In October of 1993, Dillon Ranches, which operates Sandco, a sand and gravel company, purchased the land it had previously been leasing as a sand and gravel pit. It was then and continues to be a fully operational permitted sand and gravel operation, although the Court heard no testimony concerning whether or not SandCo had made investments in developing and permitting the site as a sand and gravel mine prior to the purchase. The price per acre paid by Dillon Ranches was $6,060 an acre. The other comparable sales noted by Ms. Love yielded per acre land prices of between $5,370 and $7,000 per acre.

Ms. Love testified at length as to the desirability of the area around Tract B for use as large home sites. The neighborhood, to wit, the North Animas Valley surrounding Tract B, is comprised mostly of large home sites, with some commercial sand and gravel activity and some old ranch land. While she agreed that the river did pose some obstacles to the conventional use as a home site of a site such as Tract B, she opined that the unique nature of the property, containing one of the few islands in the Animas River, and the exceptional amount of riverfront constituted a large amenity and contributed to the value of Tract B. There is no doubt

that Tract B exists in a location of breathtaking natural beauty and provides a unique opportunity for privacy. Ms. Love opined that the value of Tract B on November 4, 1993, with or without the enactment of AVLUP, was $6,000 an acre or $250,000.

57. The Court also heard unrebutted testimony from Eugene Bonds, owner of Bonds Construction, who as described above in paragraph 27 leased AVSG's 110 permitted mining area for extraction of sand and gravel in the early 1990s.

Mr. Bonds testified that his business is a regular consumer of sand and gravel, that he is knowledgeable in its extraction and application, and that he thought highly of the product he extracted from AVSG's permitted area. Prior to the enactment of AVLUP, Mr. Hanks offered the sale of Tract B in its entirety to Mr. Bonds for $1 million, a price Mr. Bonds felt was fair and reasonable. Mr. Bonds indicated that he did not have the financial wherewithal to make the purchase but that it was offered at a fair price.

CONCLUSIONS OF LAW

1. The burden is on Plaintiff to establish the allegations set forth in its petition by a preponderance of the evidence. C.R.S. 13-25-127. The Court has utilized this burden of proof in making its findings of fact and conclusions of law regardless of the fact that certain of the cases upon which the Court has relied for authority required a different burden of proof.

2. The governmental regulation at issue in this case is the Animas Valley Land Use Plan (AVLUP), itself an amendment to the La Plata County Permit System. AVLUP included the majority of Tract B in the category of River Corridor Property, which designation

carried with it a prohibition upon industrial and mining activity.

The substantive and procedural validity of the actions and decisions of La Plata Board of County Commissioners (BOCC) to adopt and subsequently amend AVLUP was the subject matter of La Plata County District Court action 94CV69, a Rule 106(a)(4) action by AVSG against the BOCC. It was the determination of the District Court in that case that AVLUP was lawfully enacted pursuant to the appropriate statutes of the State of Colorado.

The burden of proof would be on Plaintiff to establish that there was no legitimate governmental purpose in enacting AVLUP. No such allegations are made either in Plaintiffs original petition nor its amended petition in this action. The Court heard no evidence or argument from Plaintiff that the enactment of AVLUP was not pursuant to a legitimate government purpose. The Court does not understand AVSG to be asserting that there was no legitimate governmental purpose behind AVLUP.

It is the conclusion of the Court that the Defendant BOCC enacted AVLUP pursuant to a legitimate governmental purpose.

3. After the first trial in this case, the Court entered its order on July 23, 1998, concluding that the regulation (AVLUP) did not render AVSG's land economically idle. The Court concluded that there were sufficient alternative uses available to Plaintiff to determine that the land retained reasonable economic value. The conclusions reached in that order are incorporated herein. The Court concludes that Plaintiff has failed to prove a per se taking.

4. Despite this determination, Plaintiff is still entitled to attempt to prove that a taking has occurred

under a fact specific inquiry. Palazzolo v. Rhode Island, 121 S.Ct. 2448 (2001); Animas Valley Sand and Gravel v. Board of County Commissioners, 38 P.3d 59 (Colorado 2001). A taking may be effected by the government's physical occupation of the land or by regulation restricting the land's use. While a landowner is not entitled to the most beneficial use of his or her land, extensive regulatory interference warrants compensation. AVSG v. BOCC, supra Penn Central Transportation Company v. New York City, 438 U.S. 104 (1978); Van Sickle v. Boyes, 797 P.2d 1267 (Colo. 1990) Sellon v. City ofManitou Springs, 745 P.2d 229 (Colo. 1987); Pennsylvania Coal Company v. Mahon, 260 U.S. 393 (1922). While property may be regulated to a certain extent, if a regulation goes too far it will be recognized as a taking.

5. In rendering its earlier orders, the Court focused only on the portion of Plaintiffs land most severely affected by the regulation, to wit, the 33 acres of river corridor property within Tract B. It is inappropriate to limit a takings inquiry solely to a particular part of the land, and the Court must look to the regulation's effect on the entire parcel owned by the landowner, in this case the entirety of Tract B. A VSG v. BOCC, supra. Accordingly, all findings and conclusions set forth in this order pertain to the effect of AVLUP upon the entirety of Tract B.

6. Plaintiff brings actions pursuant to both the United States and Colorado Constitutions, each of which include takings clauses. The federal takings clause provides "nor shall private property be taken for public use, without just compensation." U.S. Constitution, Amendment V. This provision is applicable to the states through the 14th Amendment. Chicago, B. and Q.R. Co. v. Chicago, 166 U.S. 226

(1887). The Colorado takings clause provides, in relevant part, "[p]rivate property shall not be taken or damaged, for public or private use, without just compensation." Colorado Constitution, Article II, Section 15.

In determining the scope of Article II, Section 15 of the Colorado Constitution as compared to that of the Fifth Amendment of the Federal Constitution, the Colorado Supreme Court has interpreted the "damage" language in Colorado's takings clause to provide broader rights than does the federal clause, but only in so far as it allows recovery to landowners whose land has been damaged by "the making of-public improvements abutting their lands, but whose lands have not been physically taken by the government." City ofNorthglenn v. Grynherg, 846 P.2d 175 (C olo.1993). Puhlic Service Company of Colorado v. Van Wyk, 27 P.3d 377 (Colo. 2001). Other than this specific additional coverage, the Colorado takings clause has been interpreted as consistent with the federal takings clause. Central Colorado Water Conservancy District v. Simpson, 877 P.2d 335 (Colo. 1994).

The Court has discerned no evidence indicating that there have been public improvements or governmental activity in areas adjacent to AVSG's land which affects its value. Clearly it is the effect of the regulation itself upon Tract B that is at issue. Accordingly, the Court concludes that the scope of the takings analysis under the facts of this case is identical pursuant to the takings clauses of the United States and Colorado Constitutions.

7. A landowner cannot establish a takings claim simply by showing that they have been denied the ability to exploit a property interest that they had previously believed was available for development.

Penn Central Transportation Company v. New York City, supra AVSG v. BOCC, supra. While the Court concludes that this doctrine mitigates against the finding of a taking in this case, the Court cannot conclude that it is dispositive. AVSG had clearly made attempts to obtain the appropriate federal and state permits for mining activity prior to the introduction of AVLUP, and continued in that effort after the regulation was enacted. AVSG had attempted to develop a mining plan prior to the enactment of the regulation.

8. There is no precise level of interference at which a governmental regulation will be found to have constituted a taking under a fact specific inquiry.

A mere decrease in property value is not sufficient to establish a taking. It is apparent that the level of interference caused by the regulation must be very high. Palazzolo, supra AVSG v. BOCC, supra. The fact specific inquiry should resolve whether the property in question retains more than a de minimis value, but when its diminished value is considered in connection with other factors, the property effectively has been taken from its owner.

While no formula exists which requires the application of specific factors to this analysis in all cases, this Court is guided in its consideration by the findings of the Colorado Supreme Court in A USG v. BOCC, supra. The Court must consider whether or not there was a diminution in value to Tract B that is both substantial and attributable to AVLUP, and if such diminution is found, the Court must determine whether or not AVSG's reasonable investment-backed expectations were adversely impacted by the Plan. While no set formula exists for determining when a compensatory regulatory taking has occurred, the

evidence in this case has focused primarily on the two factors set forth above.

9. The Court has found that AVSG's ability to mine sand and gravel on Tract B is affected both by federal, state and local regulatory schemes, as well as AVLUP. In making its findings, the Court has noted that while significant regulatory and permit issues existed as obstacles to the creation of a profitable mining plan on Tract B, that such a plan was still possible until the enactment of AVLUP. In reaching its conclusions concerning the diminution in value of Tract B attributable to AVLUP, the Court has considered the evidence relevant to value of Tract B both before and after the enactment of AVLUP.

10. Fair market value, or reasonable market value, is defined as the "the fair, actual, cash market value of the property. It is the price the property could . have been sold for on the open market under the usual and ordinary circumstances, that is, under those circumstances where the owner was willing to sell and the purchaser was willing to buy, but neither was under an obligation to do so." CJI, Civil 4th, 36:3.

11. The Court has considered all of the testimony concerning the value of Tract B on November 4, 1993, both with and without the imposition of AVLUP. The Court concludes that the discounted cash flow method is inappropriate for calculating the value of the property, preregulation, because it rests on too many assumptions for which the evidence is simply too speculative. While Mr. Hanks is a knowledgeable operator, capable of mining the property himself, substantial uncertainties exist concerning the quality and extent of material reserves on the property. Substantial uncertainties are also faced by any operator in getting a mining operation permitted, constructed,

and product brought to market at a sufficient level of profitability.

Rather, the Court relies on both the royalty income and comparable sales methods of appraisal in reaching its conclusions concerning the reasonable market value of Tract B, with and without AVLUP, on November 4, 1993. As the Court has found, AVSG has established that it could have permitted, constructed and brought to market some mining plan which would have been profitable, but that substantial obstacles of regulatory compliance, cost and time would have to be overcome. Had AVLUP not been enacted, the Court is unable to agree that the value of Tract B was unaffected by its potential use as a sand and gravel operation. The comparable sales of sand and gravel properties referred to by Ms. Love each lacked certain basic information necessary to know if they were truly comparable. Hence the Court relies primarily on the opinion based on the royalty income approach, as well as AVSG's offer to sell the property in the early 1990's to Mr. Bond for $1 million, in reaching its determination. The Court concludes that the reasonable market value of Tract B on November 4, 1993, had AVLUP not been enacted, was eight hundred fifty thousand dollars ($850,000).

As to the value of Tract B as a homesite after the enactment of AVLUP, the Court concludes that the comparable sales method of appraisal is the appropriate approach to valuation. while the unique nature of Tract B poses some practical obstacles to its development as a homesite, its location, extensive river frontage and opportunity for privacy more than offset these problems. Tract B is unique, but still comparable in value to other properties in its neighborhood, the North Animas Valley, and the Court concludes that its post-

regulation, reasonable market value as of November 4, 1993, was $250,000.

12. The Court has considered and weighed all of the evidence as to whether or not Plaintiff had reasonable, investment -backed expectations of developing Tract B as a mining operation had AVLUP not been enacted. The Court has considered the history of mining on the property, the expertise of James Hanks in dredging activities, the evidence of quality historical material reserves on Tract B, AVSG's ownership of sufficient equipment to implement a feasible mining plan, the likelihood that some such mining plan could ultimately be permitted, and the existence of market conditions which could have supported such an operation. Based upon these considerations, the Court concludes that AVSG had reasonable, investment-backed expectations that it, in the absence of AVLUP, could have designed, permitted and operated a profitable sand and gravel mine on Tract B.

13. As the Court has found, AVSG purchased the Original AVSG Property in 1961 for $6,000. Most but not all of the Original AVSG Property is comprised of Tract B. The fact that AVSG had previously leased that property for sand and gravel mining purposes, and that AVSG subsequently utilized Tract B for such purposes, leads the Court to conclude that AVSG purchased the property with the expectation that it would be used to mine sand and gravel and other minerals. While AVSG might reasonably have expected its initial investment to have appreciated in value to $850,000 by 1993, in the absence of AVLUP, for use as a sand and gravel mine, AVSG is not entitled under the law to compensation for diminution in value of the land's best and highest use. Van Sickle v. Boyes, 797 P.2d 1276. While its best and highest use has been eliminated by AVLUP, Tract B

retains substantial value ($250,000) as a home site. Although the value of Tract B has been reduced by 70.6 percent, this does not mean that a regulatory taking has occurred. As pointed out by the Colorado Supreme Court, in many cases it has been determined that even a significant reduction in the value ,did not result in a taking, to wit: Agins v. Tihuron, 447 U.S. 285 (1980) (no taking with an 85% reduction in value) Village ofEuclid v. Amhler Realty Co., 272 U.S. 365 (1926) (no taking with a 75% reduction in value); and Hadachek v. Sehastian, 239 U.S. 394 (1915) (no taking with a 92.5% reduction in value). AVSG v. BOCC, supra. Despite AVLUP, Tract B retains a reasonable use as a home site and is saleable. Hence, the Court concludes that despite AVLUP's interference with the reasonable, investment-backed expectations of AVSG, no taking has occurred. ParkAvenue Tower Associates v. New York City, 746 F.2d 135 (2d Cir.,1984); Pompa Construction Corp. v. City of Saratoga Springs, 706 F.2d 418 (2d Cir.,1983).

Accordingly, IT IS ORDERED

1. Plaintiffs claim for compensation for a regulatory taking pursuant to the Colorado Constitution, Article II, Section 15, is denied; and

2. Plaintiff s claim for compensation for a regulatory taking pursuant to the United States Constitution, Amendment V, is denied.

Case Number:

96-CV-45
DISTRICT COURT, LA PLATA COUNTY, COLORADO

1060 East Second Avenue, Durango, Colorado 81301
970.247.2304
Plaintiff:

ANIMAS VALLEY SAND AND GRAVEL, INC.,

Defendant:

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF LA PLATA, COLORADO.

Attorney for Plaintiff:
William E. Zimsky
Abadie & Zimsky, LLC
813 Main Avenue, Suite 300
Durango, Colorado 81301

Phone Number: 970.385.4401
FAX Number: 970.385.4901
E-mail: zimsky@durangolaw.biz
Attorney Reg. No.: 25318

PLAINTIFF'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

COMES NOW Plaintiff Animas Valley Sand & Gravel, Inc., by and through its attorneys, Abadie & Zimsky, LLC, and hereby submits its proposed findings of fact and conclusions of law.

1. PROPOSED FINDINGS OF FACT:

A. GENERAL OVERVIEW OF THE SUBJECT PROPERTY

i. AVSG's Purchase and the Development of the Subject Property

1. John Hanks, the man who started AVSG, is a third generation sand and gravel operator who has been in the sand and gravel business since he was fourteen years old.[1]

***[50] market value of the property, holding that "evidence of reasonable future use is admissible to determine the present fair market value of property." 697 P.2d at 776. Consequently, under *Mahaffey*, the fact that AVSG might not have actively engaged in mining the property immediately before the implementation of the AVLUP not affect the value of the property – which is based on "reasonable future use" and "highest and best use."

[1] Tr. 16 (ln. 8-19). Cites to the Trial Transcript will be referred to as "Tr. at ____." Cites to the Stipulated Facts will be noted as "Stip. Facts at ¶ __"

D. The character of the government action was to provide a benefit to the public, which the County attempted to force AVSG to bear alone the burden.

The character of the governmental action in adopting the AVLUP was to provide a benefit to the public by making the Subject Property more scenic and attractive. PFF at ¶ 33. However, AVSG did not enjoy any reciprocal benefit. *Id.* Under such circumstances, the character of the government action gives rise to a takings claim. "One of the principal purposes of the [United States constitution's] Takings Clause is 'to bar Government from forcing some people alone to bear public burdens, which, in all fairness and justice, should be borne by the public as a whole" *Dolan v. City of Tiger*, 512 U.S. 374, 384 (1994), quoting, *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

E. The fact that AVSG would have had to apply for a Class II permit does not mean that the statute of limitations expired on AVSG's takings claim.

In its Trial Brief, the County contends that AVSG's takings claim is barred by the statute of limitations because the County passed a land use code in the late 1980's that would have required AVSG to obtain a Class II permit to mine the entire Subject Property. The County's argument is flawed for a number of reasons.

First, there is no indication that AVSG would not have received a Class II permit for the sand and

gravel operations. The record is replete with references to sand and gravel operations

(2)

No. 06-1123

FILED
APR 16 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

ANIMAS VALLEY SAND AND GRAVEL, INC.,

Petitioner,

v.

THE BOARD OF COUNTY COMMISSIONERS FOR THE COUNTY OF LA PLATA, COLORADO,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals of Colorado

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MICHAEL A. GOLDMAN
Counsel of Record
GOLDMAN, ROBBINS & NICHOLSON, P.C.
P.O. Box 2270
Durango, CO 81302
(970) 259-8747

Counsel for Respondent

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether a zoning regulation that frustrates a landowner's reasonable investment-backed expectations and diminishes the value of his property by 70.6 percent effect a compensable regulatory takings?[1]

[1] Respondents have reframed the question presented because whether the zoning regulation was "enacted primarily for aesthetic purposes and not to prevent some important public harm or injury" was not a finding or conclusion drawn by the trial court and is solely the opinion of the Petitioner and therefore, improperly set forth in the question presented.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
JURISDICTION	1
STATUTES OR OTHER PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE PETITION	4
I. THE COLORADO COURT OF APPEALS HAS AFFIRMED THE USE OF THE AD HOC FACTUAL-SPECIFIC INQUIRY TO A FEDERAL TAKINGS QUESTION	4
II. THE COLORADO COURT OF APPEALS HAS AFFIRMED AN IMPORTANT FEDERAL TAKINGS QUESTION WHICH DOES NOT CONFLICT WITH RELEVANT DECISIONS OF THIS COURT	9
CONCLUSION	11

TABLE OF AUTHORITIES

Page

CASES

Agins v. Tiburon, 447 U.S. 285 (1980) 7, 8, 10

Andrus v. Allard, 444 U.S. 51 (1979) 6

Animas Valley Sand & Gravel Inc. v. Board of County Commissioners, 38 P.3d 59 (Colo. 2001) 1, 3, 4, 7, 8

Chicago, B. and Q.R. Co. v. Chicago, 166 U.S. 226 (1897) 2

City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 704 (1999) 11

Concrete Pipe & Products of California, Inc. v. Construction Laborers' Pension Trust, 508 U.S. 602 (1993) 8

Eastern Enterprises v. Apfel, 524 U.S. 498 (1998) 6

Goldblatt v. Town of Hempstead, N.Y., 369 U.S. 590 (1962) 5

Hadacheck v. Sebastian, 239 U.S. 394 (1915) 7, 8

Keystone Bituminous Coal Assn. v. DeBenedictis, 480 U.S. 470 (1987) 10

Lingle v. Chevron U.S.A., Inc., 544 U.S. 528 (2005) ... 6, 10, 11

Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) 6, 7, 11

Palazzolo v. Rhode Island, 533 U.S. 606 (2001) 3, 7

Penn Central Transportation Company v. New York City, 438 U.S. 104 (1978) 4, 5, 6, 10, 11

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) 5, 6

TABLE OF AUTHORITIES – Continued

Page

Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302 (2002) 11

United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985) 7, 11

U.S. v. Central Eureka Mining Company, 357 U.S. 155 (1958) 6

Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) 7, 8

Yee v. Escondido, 503 U.S. 519 (1992) 11

CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment V 1

United States Constitution, Amendment XIV 1, 2

Colorado Constitution, Article II, §15 2

STATUTES

28 U.S.C. §1254(1) 1

28 U.S.C. §1257 1

OPINIONS BELOW

The Colorado Court of Appeals affirmed the judgment of the District Court of La Plata County, Colorado, Case No. 04CA2437 in an unpublished opinion announced on April 6, 2006 holding that the trial court's findings and conclusions are consistent with the analysis prescribed in *Animas Valley Sand & Gravel Inc. v. Board of County Commissioners*, 38 P.3d 59 (Colo. 2001) and that "[we] cannot conclude that the trial court was required to find, based on these or any additional factors cited by Plaintiff, that this case fell into the 'rare category' of cases in which the land retains value but the totality of the circumstances nevertheless evidences a taking." Appendix p. 8a to Petition for Writ of Certiorari. The Colorado Supreme Court denied Petitioner's Petition for Writ of Certiorari on November 13, 2006. Appendix p. 1a to Petition for Writ of Certiorari.

JURISDICTION

The Petitioner misstates the invocation of jurisdiction as deriving from 28 U.S.C. §1254(1) since this case has not been in the Federal Court of Appeals. In any event, jurisdiction may be derived through application of 28 U.S.C. §1257.

STATUTES OR OTHER PROVISIONS INVOLVED

The Federal Takings Clause provides "nor shall private property be taken for public use without just compensation." U.S. Constitution, Amendment V. This provision is applicable to the States through Amendment XIV

to the United States Constitution. *Chicago, B. and Q.R. Co. v. Chicago*, 166 U.S. 226 (1897).

STATEMENT OF THE CASE

In 1996, the Petitioner, Animas Valley Sand & Gravel, Inc. (hereinafter "Petitioner" or "AVSG"), brought an inverse condemnation action against the Respondent, Board of County Commissioners of the County of La Plata, Colorado (hereinafter the "Respondent" or "County"). AVSG's claim is based upon the November 1993 adoption by the County of the Animas Valley Land Use Plan "a zoning land use plan" (hereinafter referred to as the "Plan"). The Plan designated just a portion of AVSG's land (33 out of 41 acres) as being within the river corridor district. Under the Plan, AVSG is prohibited from operating a sand and gravel mining operation only upon that portion of property designated as being within the river corridor district. The remaining eight (8) acres of AVSG's tract of land was designated as industrial district, since that was the portion of property upon which AVSG had a Colorado Mined Land Reclamation Act Permit to mine sand and gravel and, as such, AVSG was allowed to continue to operate a sand and gravel mining operation on that portion of its property pursuant to the Plan.

Pursuant to its Amended Complaint filed on January 6, 2003, AVSG argued that as a result of the river corridor designation on a portion of the subject property, a "taking" of its property had occurred in violation of Article II, §15 of

the Colorado Constitution and the Fifth Amendment to the United States Constitution.[2]

After the case was first tried in 1998 and the trial court ruled against AVSG finding that its property retained economic value, the Colorado Supreme Court, on Certiorari review, held that a compensable regulatory taking could occur even if the property subject to the regulation retained some economically viable use. *Animas Valley Sand & Gravel, Inc. v. Board of County Commissioners of the County of La Plata, Colorado*, 38 P.3d 65 (Colo. 2001). The Colorado Supreme Court remanded the case back to the trial court with specific directions to conduct a prescribed fact-specific inquiry to determine whether a taking had occurred. *Id.* In particular, the Colorado Supreme Court set forth standards regarding the application of the second tier of analysis to the whole interest in property owned by AVSG. The Court stated that:

> [I]f AVSG is to prevail, it must show that it falls into the *rare* category of a landowner whose land

---

[2] The court had previously conducted a two-day trial in 1998 solely on the issue whether a takings occurred under the Colorado Constitution. In that case, the trial court determined that the Plan did not effect a compensable taking. At that time, the trial court focused its inquiry only on that portion of property designated as river corridor. Still, the trial court determined that AVSG failed to prove that the Plan rendered the river corridor property economically useless, and therefore, did not effect a taking. Since then, the United States Supreme Court decided *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001) which resolved any doubt that there is a two-tiered inquiry in a regulatory takings analysis such that if a landowner fails to meet its burden of proving a *per se* taking (whereby a regulation effectively denies all beneficial and economic use of property), the landowner may still prove a taking pursuant to a fact-specific inquiry. *Id.* at 617.

> has a value slightly greater than de minimis but, nonetheless, given the totality of the circumstances, has had its land taken by a government regulation.

Id. at 67 (emphasis supplied). At the second trial in 2003, the trial court analyzed AVSG's takings claims using a number of factors including those prescribed by the Colorado Supreme Court and as set forth in *Penn Central Transportation Company v. New York City*, 438 U.S. 104 (1978). No taking was found. Upon review after the second trial, the Colorado Court of Appeals held that the proper inquiry was utilized and accomplished by the trial court in applying the prescribed analysis set forth by the Colorado Supreme Court in *Animas II*.[3]

Thereafter, AVSG was unsuccessful in its Petition for Writ of Certiorari filed in the Colorado Supreme Court. That Petition was denied *en banc* on April 6, 2006. Appendix p. 1a to Petition for Writ of Certiorari.

REASONS FOR DENYING THE PETITION

I. THE COLORADO COURT OF APPEALS HAS CORRECTLY AFFIRMED THE USE OF THE AD HOC FACTUAL-SPECIFIC INQUIRY TO A FEDERAL TAKINGS QUESTION.

By this Petition, AVSG is searching for a formulaic solution to the required *ad hoc* inquiry on regulatory

[3] *Animas II* refers to *Animas Valley Sand & Gravel, Inc. v. Board of County Commissioners of the County of La Plata, Colorado*, 38 P.3d 65 (Colo. 2001).

takings claims,[4] arguing that a vacuum needs to be filled in takings jurisprudence. AVSG fails to provide the legal basis for establishing a bright-line pass/fail test for the takings analysis. In fact, precedent calls for the opposite approach to the takings inquiry.

Where regulation places limitations on property that fall short of eliminating all economically beneficial use, "a taking, nonetheless, may have occurred, depending on a complex of factors including the regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action." *Penn Central, supra*, at 124. The determination of a taking is "a question of degree – and therefore, cannot be disposed of by general propositions." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). Many of this Court's cases have emphasized this aspect of the takings analysis observing that the Court has been unable to develop any "set formula" to determine where regulation ends and taking begins." *Goldblatt v. Town of Hempstead*, N.Y., 369 U.S. 590, 594 (1962). The takings analysis "calls as much for

---

[4] In its search, AVSG asserts that "the primary purpose of the regulation was to promote a scenic corridor and not to prevent important public harm or injury," yet does not cite anything in the record for support, nor does the trial Court's Order set forth any such finding or draw such conclusion. See, Petitioner's Petition for Writ of Certiorari p. 9. Additionally, Petitioner opines that "sand and gravel production is an economically necessary and socially beneficial activity and one that the Plan actually allows to occur at 21 other locations within the Plan's area," however this statement is misleading and is not entirely supported by the record, in that, any sand and gravel operation (including 10 acres of AVSG's property) that was previously permitted by the State of Colorado within the Plan area at the time of the adoption of the Plan was allowed to continue under an industrial designation to the Plan map. Appendix p. 16a, number 8 to Petition for Writ of Certiorari.

the exercise of judgment as for the application of logic." *Andrus v. Allard*, 444 U.S. 51, 65 (1979). *Penn Central* itself stresses that there is no "set formula" for determining when a compensable regulatory taking has been effected, calling instead, on the need to conduct "ad hoc, factual inquiries." *Id.* at 124. See *U.S. v. Central Eureka Mining Company*, 357 U.S. 155, 168 (1958) ("question properly turning upon the particular circumstances of each case."); *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998) (inquiry as to whether governmental action results in an unconstitutional taking does not lend itself to any set formula, but must arise from essentially an ad hoc and fact-intensive analysis of the circumstances.)

This Court has remained clear that in attempting to determine how far is "too far," that is, whether a regulation's impact gives rise to a taking, it "must remain cognizant that government regulation – by definition – involves the adjustment of rights for the public good," *Andrus v. Allard*, *supra*, at 65, and that "government hardly could go on if to some extent values incident to property could not be diminished without paying for every change in the general law," *Mahon, supra*, at 413; see *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 537 (2005). Justice Scalia, writing for the majority in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) acknowledged:

> [T]hat in at least some cases a landowner with 95% loss will get nothing, while the landowner with total loss will recover in full. But that occasional result is no more strange than the gross disparity between the landowner whose premises are taken for a highway (who recovers in full) and to the landowner whose property is reduced to 5% of its former value by the highway (who

> recovers nothing). Takings law is full of these "all-or-nothing" situations.

Lucas v. South Carolina Coastal Council, supra at 1019, fn8. Hence, a mere decrease in land value is not enough in a factual-specific regulatory takings inquiry; rather, the level of regulatory interference must be "very high." *Animas II, supra*, at 66.

This Court has grappled with the specific point at which diminution in property value will give rise to a compensable taking, however, it has declined to find a taking in cases where there was a significant reduction in a property's value, to wit: *Agins v. Tiburon*, 447 U.S. 285 (1980) (no taking with an 85% reduction in value); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (no taking with a 75% reduction in value); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (no taking with a 92.5% reduction in value).

This Court has often reiterated that takings' law "does not supply mathematically precise variables, but instead provides important guideposts that lead to the ultimate determination whether just compensation is required." *Palazollo v. Rhode Island, supra*, at 634. Although there is no judicially created regulatory takings bright-line test, this Court has historically held that the diminution in value attributable to the government's regulation must involve extreme circumstances before giving rise to a takings. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126 (1985). To date, Petitioner has been unable to cite a case in which a taking was found where

the regulated property at issue still retained 30% of its pre-regulation value.[5]

Mere diminution in the value of property, however serious, is insufficient to demonstrate a taking. *Concrete Pipe & Products of California, Inc. v. Construction Laborers' Pension Trust*, 508 U.S. 602, 645 (1993). *Concrete Pipe* specifically cites the cases of *Village of Euclid, supra*, and *Hadacheck, supra*, with approval on the proposition that its previous decisions rejecting takings challenges to governmental restrictions leading to economic losses as high as 92.5% remain the law of the land.

In the case here, despite the Plan, AVSG's property retains a reasonable use as a home site and is saleable. Appendix p. 46a to Petition for Writ of Certiorari. The trial court in completing its ad hoc analysis found no taking. *Id.* The Colorado Court of Appeals appropriately held that the trial court's findings and conclusions are consistent with the analysis set forth in detail in *Animas II* as prescribed by the United States Supreme Court. Appendix. p. 6a to Petition for Writ of Certiorari.

---

[5] Petitioner argues that *Agins*, *Euclid* and *Hadacheck* (which support an overwhelmingly large diminution in value before a taking can be found) are distinct since those cases were based primarily on substantive due process or equal protection theories and are not regulatory takings cases. Although the facts of each case may vary slightly with the facts here, it remains that each case weighs a regulation's effect upon the value of property, i.e., *Hadacheck, supra* (regulation prohibiting a brickyard in a residential area whereby the value of the land was $800,000.00 for entire tract when unzoned, and $60,000.00 as zoned.); *Village of Euclid, supra* (regulations prohibit industrial use resulting in a reduction in value from $10,000.00 per acre to $2,500.00 per acre); *Agins, supra* (city's open space, and land zoning ordinances restricted previously purchased 5-acre tract of land to 1 to 5 single-family residences and open-use).

II. THE COLORADO COURT OF APPEALS AFFIRMED AN IMPORTANT FEDERAL TAKINGS QUESTION WHICH DOES NOT CONFLICT WITH RELEVANT DECISIONS OF THIS COURT.

In an attempt to create additional circumstances apart from the economic factors analyzed by the trial court, AVSG has argued, for the first time in Colorado's appellate courts, against the character of the governmental action. AVSG had always conceded this point. At trial, AVSG's counsel stated:

> Animas Valley Sand and Gravel is not challenging the regulation of Animas Valley land use. We're accepting it. The County had the authority to zone his [sic] property. All we're saying is under the State and Federal Constitution, that it is fundamentally unfair to force Mr. Hanks, Animas Valley Sand and Gravel – and the purpose of that was to beautify or to make the corridor of the entrance to the North part of Durango and La Plata County attractive. We accept that, we accept that that's part of their authority to do so.
>
> . . .
>
> So we're not disputing at all their authority to pass a regulation, we're not saying the regulation is a bad idea, we're just saying okay, if you're going to do that, let's be fair about it. Let's spread the burden.

Trial record, Vol. X at p. 19 ln. 24-25; p. 20 ln. 1-9, 17-20.

The trial court and the Colorado Court of Appeals correctly found that AVSG had not previously raised issues concerning the character of the governmental action in adopting the Plan. Appendix p. 38a-39a and p. 8a to Petition for Writ of Certiorari. Assuming *arguendo* that

AVSG properly raised issues as to the character of the governmental action, there is no conflict with the decision in *Lingle v. Chevron U.S.A., Inc.*, *supra*. That case held that a formula used to inquire whether governmental regulation of private property "substantially advances" legitimate state interests was a due process inquiry, and is not an appropriate stand-alone test for determining whether regulation effects a Fifth Amendment taking. *Id.*, at 540.

Importantly, any reference to whether the Plan serves a legitimate governmental purpose was not solely utilized in the analysis, nor was it used to find a constitutional takings in this instance. The trial court appropriately analyzed Petitioner's takings claim utilizing the factors as set forth in *Penn Central, supra*. Significantly, the evidence in this case focused primarily on the economic impact and reasonable investment-backed expectation factors. Appendix p. 42a-43a to Petition for Writ of Certiorari. Moreover, since AVSG did not rely on the "substantially advances" test in support of its takings claim, nor did the trial court's Order hinge on this test, it is not clear what relevance the issue has here.

Assuming any relevance, for the reasons set forth in *Lingle, supra*, there is no need to disturb the holding in this case since the trial court ultimately found no taking. Appendix p. 46a to Petition for Writ of Certiorari. This Court's holding in *Lingle* is applicable here:

> We emphasize that our holding today – that the "substantially advances" formula is not a valid takings test – does not require us to disturb any of our prior holdings. To be sure, we applied a "substantially advances" inquiry in *Agins* itself, see 447 U.S. at 261-262 (finding that the challenged zoning ordinances "substantially advance[d] legitimate governmental goals"), and arguably also in *Keystone*

> *Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 485-492 (1987) (quoting: "'substantially advance[s]'" language and then finding that the challenged statute was intended to further a substantial public interest). But in no case have we found a compensable taking based on such an inquiry. Indeed, in most of the cases reciting the "substantially advances" formula, the Court has merely assumed its validity in referring to it in dicta. See *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 334 (2002); *Del Monte Dunes*, 526 U.S., at 704; *Lucas*, 505 U.S., at 1016; *Yee v. Escondido*, 503 U.S. 519, 534 (1992); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985).

Lingle, *supra*, at 545. Similarly, since no taking was found subsequent to review based primarily upon the *Penn Central* inquiry and not the substantially advances formula, there is no need for any additional review here.

CONCLUSION

Wherefore, based upon the foregoing arguments and authorities, Respondent respectfully requests the Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

GOLDMAN, ROBBINS & NICHOLSON, P.C.

MICHAEL A. GOLDMAN,
Post Office Box 2270
Durango, Colorado 81302
(970) 259-8747
Attorney for Respondent

April 16, 2007